

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETTY J. TURNER)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS - KNI)	
Respondent)	Docket No. 1,039,060
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 22, 2009 Order Denying Terminal Date by Administrative Law Judge Rebecca A. Sanders. Respondent and claimant requested review of the January 26, 2009 Award. The two appeals were consolidated for review by the Board which heard oral argument on May 15, 2009.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

After the terminal dates for submission of evidence had expired on this claim, the respondent filed a motion to extend its terminal date in order to re-depose Dr. Zimmerman. The Administrative Law Judge denied the motion on January 22, 2009. The ALJ then issued the Award on this claim on January 26, 2009.

The two issues litigated before the ALJ included whether claimant's longevity bonus should be included in the calculation of her average gross weekly wage and the nature and extent of her disability. The ALJ noted that K.S.A. 44-511(a)(2) provides that additional

compensation (which includes cash bonuses) is not included in the calculation of the average gross weekly wage until such remuneration is discontinued. Because claimant continued to work for respondent the ALJ did not include the longevity bonus in the claimant's average gross weekly wage calculation. The ALJ further determined claimant was entitled to compensation for a 33 percent whole person functional impairment.

Respondent requests review of the ALJ's order denying its request for an extension of its terminal date for the purpose of re-deposing Dr. Daniel Zimmerman in light of a second medical report issued by Dr. Zimmerman. Respondent contends that in this second medical report, Dr. Zimmerman opines that claimant has additional impairment as a result of a second accident while employed at respondent. Respondent argues that the subsequent opinion of Dr. Zimmerman suggests that his credibility in this matter is suspect.

In regard to the Award entered in this case, respondent requests the Board affirm the finding of the ALJ that claimant's longevity bonus should not be included in her average weekly wage for calculation purposes. Respondent, however, requests that the Board find that the ALJ erred in accepting Dr. Zimmerman's opinion that claimant has a 33 percent functional impairment as a result of this accident because he used the *AMA Guides*¹ range of motion model rather than the preferred DRE model. Respondent requests the Board find that claimant, at most, has a 10 percent permanent partial impairment to the whole body.

Claimant argues that Dr. Zimmerman explained how he arrived at his rating and that it was in compliance with the *AMA Guides*. Claimant further argues that respondent failed to present affirmative evidence on the nature and extent of claimant's disability and Dr. Zimmerman's testimony was uncontradicted. Therefore, claimant requests the Board affirm the ALJ's finding that she has a 33 percent functional impairment to the body as a whole. Concerning claimant's average weekly wage, she argues that her longevity pay should be considered as a one-time bonus and averaged over a 52-week period, and that amount should be included in her average weekly wage. Lastly, claimant argues that respondent has shown no good cause for an extension of its terminal date and the ALJ's order denying the extension should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On December 22, 2006, claimant injured her back while lifting a bucket of water. She described her pain as being in her back in the area of her tail bone on the right. She also felt pain from her right buttock down her right leg. She reported the injury to respondent and was sent to St. Francis Hospital for treatment, where she was seen by Dr. Donald Mead. Dr. Mead sent her for physical therapy and referred her to Dr. Michael Smith. Dr. Smith continued her in physical therapy and sent her to Dr. Florin Nicholae for steroid injections. She and Dr. Smith discussed surgery, but she opted not to have surgery because she was afraid her condition would worsen. Dr. Smith released her from treatment on December 4, 2007. At the time of her release, she was still taking pain medication.

After she was released in December 2007, she returned to light-duty work at respondent. She was still on light duty on April 8, 2008, when she slipped and fell at work. That fall is the subject of a separate workers compensation claim.

Dr. Daniel Zimmerman, who is board certified as an independent medical examiner, examined claimant on April 4, 2008, at the request of claimant's attorney. This was just a few days before her second accident. Claimant gave him a history of her injury, saying that because respondent was short of staff, she had to do extra stooping, bending and lifting and so developed pain and discomfort in her back that gradually increased over time. She did not describe a specific incident or thing she was lifting.

Upon examination, Dr. Zimmerman found claimant had severe range of motion restriction at the lumbar level. She had tenderness to palpation over the lumbar paraspinal musculature. She had a numbing sensation on the right side compared to the left. She had weakness in her right leg and slight weakness in her left leg. She had sensory changes in her right leg and radicular pain in the right leg. Claimant had such severe pain and discomfort in other testing protocols that Dr. Zimmerman did not believe it was appropriate or necessary for him to do some of the harder tests that can be more painful. Performance on those tests also could put her in danger of re-aggravation or worsening of her condition. Claimant was in too much pain to perform heel, toe and tandem walking. X-rays taken in Dr. Zimmerman's office revealed degenerative change at L4-5 and disc space narrowing at L5-S1 and L4-5. There were also osteoarthritic changes at L3-4, L4-5 and L5-S1.

Based on the *AMA Guides*, Dr. Zimmerman rated claimant as having a 33 percent permanent partial impairment to the whole body using the range of motion model. Dr. Zimmerman believed the range of motion model was the most appropriate for claimant because her severe pain and discomfort and her radicular quality could not be encompassed using the DRE model. Further, he did not believe the DRE model allowed consideration of both levels of her disc disease. He testified that although claimant may fit into DRE Category III, that would not cover her entire injury.

Initially, respondent argues the ALJ erred in denying its request for an extension of terminal dates in order to re-depose Dr. Zimmerman. Respondent sought to re-depose Dr. Zimmerman after he provided claimant another rating in a second claim she had filed against respondent. Respondent argued the evidence regarding the inflated nature of the new rating would further undermine the doctor's credibility.

The Workers Compensation Act provides that terminal dates may be extended when (1) the parties agree, (2) the worker is being paid temporary total or permanent total disability compensation, (3) the worker is to undergo a medical examination that could not be conducted before the worker's terminal date, or (4) there is good cause. The Act in K.S.A. 44-523 provides, in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

(2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or

(3) on application for good cause shown.

In this case, respondent's terminal date had expired and it sought an extension in order to re-depose Dr. Zimmerman regarding a rating he provided claimant for a subsequent injury. The motion requesting the extension of the terminal date, on its face, did not establish good cause for extending the respondent's terminal date. Moreover, after considering the respondent's argument in its Motion to Extend Respondent's Terminal Date, the Board concludes there is not good cause for extension of respondent's terminal date. The ALJ did not err by denying the request for an extension.

Respondent next contends that the *AMA Guides* mandate that a physician use the Diagnosis Related Estimate (DRE) when rating a spinal impairment. Because Dr. Zimmerman used the range of motion models the respondent argues his rating should be reduced to, at most, a 10 percent permanent partial functional impairment.

Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.² It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.³

As previously noted, Dr. Zimmerman rated claimant as having a 33 percent permanent partial impairment to the whole body using the range of motion model. Dr. Zimmerman believed the range of motion model was the most appropriate for claimant because her severe pain and discomfort and her radicular quality could not be encompassed using the DRE model. Further, he did not believe the DRE model addressed the claimant's condition because she had disc disease at two levels in her spine. He testified that although claimant may fit into DRE Category III, that would not cover her entire injury. Dr. Zimmerman provided the only testimony regarding the claimant's functional impairment. And he explained why he did not use the DRE model. The ALJ's determination that claimant suffered a 33 percent permanent partial functional impairment to the whole person is affirmed.

Finally, claimant argues that her annual longevity bonus should be included in the calculation of her average weekly wage. The ALJ noted that claimant continues in the employ of the respondent. Moreover, there is no indication that the longevity bonus has been discontinued.⁴ Therefore, the ALJ determined the longevity bonus is not included in the computation of the average gross weekly wage. The Board agrees and affirms.

² *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

³ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁴ See, K.S.A. 44-511(a)(2) and K.S.A. 44-511(a)(2)(B).

AWARD

WHEREFORE, it is the decision of the Board that the Order Denying Terminal Date entered by Administrative Law Judge Rebecca A. Sanders on January 22, 2009, is affirmed.

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated January 26, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Rebecca A. Sanders, Administrative Law Judge